In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1439

EDWARD W. GREENBANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the actions of the government informer established entrapment as a matter of law.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of having conspired to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App.).

The evidence showed that one Gonzalez, a reputed trafficker in illegal drugs, had agreed to serve as an informer and that he received periodic compensation for his services. In June 1972, Gonzalez was approached by one Conde, a prior associate in the illegal drug traffic, who asked Gonzalez to drive a load of marijuana for him (Tr. 330-342).[1] He showed Gonzalez the place where

[1] "Tr." designates the reporter's transcript of the trial proceedings.

the drugs would be brought across the border, and Gonzalez relayed this information to the United States Customs Service (Tr. 294-296, 335-337). Conde subsequently introduced the informant to one Richard Gill, the buyer for the contraband (Tr. 321-322, 342). From this point on, Gonzalez acted as intermediary for the transaction (Tr. 348). Gill introduced Gonzalez to petitioner and he told Gonzalez that petitioner was his partner and had an equal share in the purchase. Petitioner assisted in arranging the details for the sale of $10,000 in smuggled marijuana (Tr. 288-290).

On the day of the sale, Gonzalez drove a 1968 Buick furnished by petitioner to the previously indicated location near the border, where Conde and others loaded the contraband in the trunk of the car (Tr. 292, 297-301, 353-354). Upon leaving the border, Gonzalez met with waiting federal agents, showed them the marijuana, and told them where Conde and the other Mexican smugglers were hiding with additional marijuana (Tr. 165-166, 212-214). Under surveillance, Gonzalez then proceeded to a motel in the town of Gila Bend, where he was to receive the payment and leave the car (Tr. 168-170). Part of the money was paid immediately, and, following a telephone call to Richard Gill, petitioner delivered the balance (Tr. 173-176, 309-315). Petitioner was observed shortly thereafter in the company of other parties to the venture, who were riding in the 1968 Buick (Tr. 184-188).

Petitioner testified in his own behalf and admitted that he assisted in the transaction knowing at the time that it was illegal (Tr. 420-424, 432-434). He also admitted discussing the possibility of future illegal drug ventures with Gonzalez (Tr. 435, 463).

Petitioner's sole contention is that the actions of the informer established entrapment as a matter of law because the government failed to observe its own laws (Pet. 14). Despite petitioner's disavowal, this is precisely the issue urged and rejected in *United States* v. *Russell,* 411 U.S. 423. In *Russell,* the majority reaffirmed the holding of *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, that the statutory defense of entrapment has as its basis the disinclination of the defendant to engage in criminal activity; the Court rejected the notion that a "defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise" (411 U.S. at 424).

However, relying on dictum in *Russell* that the Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" (411 U.S. at 431-432), petitioner seeks to establish such outrageous conduct here. This argument is without substance.

Contrary to petitioner's claim, the venture was not initiated by the informer, nor was the contraband supplied by him. Conde, who supplied the contraband, was engaged in the continuing business of smuggling marijuana and knew that Gill was interested in purchasing some of it prior to Gonzalez's association with the conspiracy. While Gonzalez acted as intermediary, his role in this criminal enterprise was certainly no greater than that of the special agent in *Russell,* who not only supplied an essential ingredient for production of the drugs but also purchased most of the drugs produced. Moreover, Gonzalez was not a government employee but

acted on an *ad hoc* basis, supplying such information as he chose to federal authorities. Moreover, the record is devoid of any indication whatsoever that Gonzalez ever said or did anything personally to induce petitioner to join the conspiracy. Petitioner was first introduced to Gonzalez as a willing participant and half owner in the venture; whatever motivated petitioner to join the conspiracy, it would not have originated with Gonzalez. In addition, petitioner admitted discussing further illegal transactions in drugs after the completion of the instant sale. In these circumstances, the actions of the law enforcement agents could hardly be characterized as a violation of the Due Process Clause.

Furthermore, the trial court, over government objection, instructed the jury in accordance with the entrapment theory urged by petitioner.[2] Even under those instructions

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[2]The instruction was as follows (Tr. 550-552):

> In that connection, you are instructed that the law protects a defendant prosecuted for an offense in which the extent of the government's involvement in the criminal activity is so great and intense and aggressive that the prosecution must fail for that reason alone. And so if you find that the witness Gonzalez was acting and doing all of the things that he reported to you on the witness stand as an agent of the government and an employee of the government, then you must find the defendants not guilty.
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> In connection with the defendants' position you are charged that an agent is one who acts in the place then of his principal, and if the principal was the Customs Service and Gonzalez was its agent, then you would have the existence of principal and agent and the agent would be acting in the position of and under the authority of and with the authority of the principal, and as I said, the law does not permit the government to so engage in criminal activity and thus convict defendants, even though the defendants are otherwise guilty of the offense.

the jury did not find entrapment, and petitioner suggests no reason for review of that factual determination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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And so if you find from the evidence that the witness Gonzalez was in fact acting under the direction of and the authority of the Customs Service, and if you find from the evidence that the government then, through its agent Gonzalez, did participate in a plan to illegally import marijuana into the United States and offer to deliver the marijuana to the defendants and actively assist in the importation and delivery of marijuana into the United States and procure and deliver the marijuana to the defendants, then you shall acquit the defendants.